

DECISION



24620
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209446

DATE: March 24, 1983

MATTER OF: Atlas Contractors, Inc.

DIGEST:

Where bid bond, required to be submitted by invitation for bids, designates one surety at top of bond form but is executed at bottom of form by a different surety, bond is defective and bid is nonresponsive, because it is not clear which surety is agreeing to be bound.

Atlas Contractors, Inc., protests the proposed award to Hancon Associates of a contract to construct a new commissary under invitation for bids (IFB) No. F41613-82-B-0023 issued by Carswell Air Force Base. Atlas contends that Hancon's bid is nonresponsive because it has submitted a defective bid bond. For the reasons that follow, we sustain the protest.

The solicitation was issued on June 18, 1982 and bids were opened on September 15. The IFB provided that each bidder should submit a bid bond with its bid in an amount equal to the lesser of 20 percent of the bid price or \$3,000,000. It also provided that failure to furnish the bond "in proper form and amount" might be cause for rejection of a bid.

At bid opening, of the nine bids received, Hancon's was low and Atlas' was second low. Hancon's bid, submitted on Standard Form (SF) 24, listed Lumbermans Mutual Casualty Company (Lumbermans) in the place at the top of the form reserved for the designation of sureties. At the bottom of the form, however, the bond was executed as follows:

120904
024974

CORPORATE SURETY(IES)

| | |
|----------------------------|--|
| Name & Address | United States Fidelity & Guaranty Company, Fort Worth, Texas |
| Signature(s) | 1. Sheryl A. Klutts (signed in ink) |
| Name(s) & Title(s) (Typed) | 2. Sheryl A. Klutts Attorney-in-fact |

With its bid, Hancon also submitted a power of attorney from Lumbermans that designated Sheryl A. Klutts, among other persons, as its agent to "make, execute, seal, and deliver * * * any and all bonds * * *." In addition, Lumbermans' seal was affixed in the space on the form reserved for the corporate surety's seal.

Atlas contends that Hancon's bid bond is ambiguous, and consequently its bid is nonresponsive, because it is not clear from the bond whether it is Lumbermans or United States Fidelity and Guaranty Company (USF&G) that is agreeing to be bound. In the event Hancon should be required to forfeit its bond, Atlas argues, it cannot be determined against whom the bond could be enforced. Atlas also argues that the bid bond is defective because it identifies the bidder as a "joint venture" but does not name the parties to the joint venture.

The Air Force contends that the bond as submitted is responsive to the IFB's requirements. It points to the fact that Lumbermans was identified as the surety at the top of the bond, that its corporate seal was affixed at the bottom, and that it had given its power of attorney to the individual who executed the bond. The Air Force argues that taken together, these facts clearly "manifest an intent that Lumbermans would be bound as surety upon the attorney in fact's signature on the bid bond." It also argues that an affixed corporate seal constitutes prima facie evidence that the signature of an authorized person is the act of the corporation. Finally, the Air Force cites several of our

decisions in support of its position that defects in bonds may be waived where there is a manifest intent to be bound.

We cannot accept the Air Force's position. When required by the IFB, a valid bid bond is a material part of the bid. Baucom Janitorial Service, Inc., B-206353, April 19, 1982, 82-1 CPD 356. Where a bidder supplies a defective bond, the bid itself is rendered defective and must be rejected as nonresponsive. Atlas Contractors, Inc./Norman T. Hardee, a Joint Venture, B-208332, January 19, 1983, 83-1 CPD 69. The determinative question is whether it can be ascertained from the bond and accompanying documents if--and against whom--the bond could be enforced in the event the bidder failed to execute the contract. A.D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194.

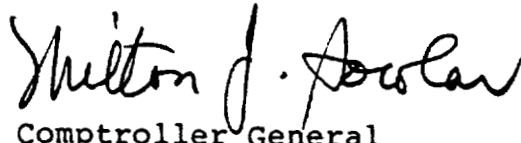
Here, it is not possible to determine which of the two firms listed on the SF-24 is acting as surety for the bond. It is true, as the Air Force argues, that the seal and the power of attorney tend to indicate that Lumbermans has agreed to be bound. It is equally true, however, that the execution clause indicates that it is USF&G that is acting as surety. Moreover, while a corporate seal affixed to a document is prima facie evidence that the document represents an official act of the corporation, the seal, in and of itself, is not conclusive. Although it raises a presumption of due execution of the document, the presumption may be overcome by a showing that the execution was not in fact an official act of the corporation. 6 W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 2466 and 2471 (rev. vol. 1979). In addition, nowhere on the power of attorney is there a reference to the particular procurement in question here. Rather, the power of attorney is a blanket conferral of agency authority on the persons designated. While the power of attorney unquestionably goes to the issue of whether the attorney-in-fact had authority to bind Lumbermans, it does not answer the question of whether she bound Lumbermans here. Under these circumstances the bond is at best ambiguous, and as such, it is materially defective, because it is not clear against whom the bond could be enforced.

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Although Hancon has submitted a letter from Lumbermans affirming its intent to act as surety for the bond, this letter, coming as it did after bid opening, cannot be considered in determining whether the bond as submitted is responsive to the solicitation. It is a settled rule that a nonresponsive bid cannot be made responsive after bid opening through change or explanation of what was intended. Baucom Janitorial Service, Inc., supra.

In light of our decision on this basis of Atlas' protest, it is not necessary to consider its other contention.

The protest is sustained.

A handwritten signature in dark ink, appearing to read "Milton J. Fowler". The signature is fluid and cursive, with the first name "Milton" being the most prominent part.

Acting Comptroller General
of the United States